89-1020

No. _____

In The

Supreme Court of the United States

October Term, 1989

ANDONIS MORFESIS,

Petitioner,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1. Whether the notice requirement of the Due Process Clause is the same for criminal contempt proceedings as for civil proceedings generally?

2. When a proceeding to punish a person for criminal contempt is commenced by service of process, whether the notice component of the Due Process Clause requires personal delivery of the process to the alleged contemnor?

3. Whether the Due Process Clause permits a person to be tried by a judge and sentenced to seven consecutive thirty-day jail terms for criminal contempt due to noncompliance with previous orders, where that person has not been personally served with the process commencing the criminal contempt proceedings, has not otherwise been directed to appear, and does not appear in court, and where there is no evidence that he was actually aware of the contempt proceedings?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the same as in the caption.

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No. _____

In The

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October Term, 1989

ANDONIS MORFESIS,

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v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered in this proceeding on May 4, 1989.

OPINIONS BELOW

The order of the Supreme Court of the State of New York, Appellate Division, First Department, decided without opinion, is reported *sub nom. Department of Housing Preservation and Development of the City of New York v.*

24 West 132 Equities. Inc., at ___ A.D.2d ___, 540 N.Y.S.2d 711, ___ N.E.2d ___ (lst Dept. 1989), and is reprinted in the appendix at App. 30. The opinion of the Supreme Court of the State of New York, Appellate Term, First Department, is reported *sub nom. Department of Housing Preservation and Development of the City of New York v. 24 West 132 Equities, Inc.*, at 137 Misc.2d 459, 524 N.Y.S.2d 324, ___ N.E.2d ___ (App. Term lst Dept. 1987), and is reprinted in the appendix at App. 1; two related per curiam opinions of the Appellate Term are unreported and are reprinted in the appendix at App. 6 and App. 8. Three opinions of the Civil Court of the City of New York, New York County, are unreported and are reprinted in the Appendix at App. 10, App. 19 and App. 25.

JURISDICTION

The order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming three orders of the Supreme Court of the State of New York, Appellate Term, First Department, in turn affirming seven orders of the Civil Court of the City of New York, New York County, adjudging Petitioner in civil and criminal contempt and imposing sentence, was entered on May 4, 1989. A timely motion for leave to appeal to the New York Court of Appeals was denied by the Appellate Division by order entered on October 24, 1989. (App. 33) This petition for a writ of certiorari is filed within sixty days of that order in compliance with Rules 20.1 and 20.2. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

New York Civil Practice Law and Rules: Section 308.

[Reprinted in Appendix at App. 35.]

New York City Civil Court Act: Section 110.

[Reprinted in Appendix at App. 37.]

STATEMENT OF THE CASE

Petitioner seeks review of an order of the New York Supreme Court, Appellate Division, First Department, entered May 4, 1989, affirming without opinion orders of the Appellate Term, First Department, entered December 8, 1987, December 23, 1987 and January 7, 1988, respectively, in turn affirming seven orders of the Civil Court of the City of New York, New York County, each adjudging Petitioner in civil and criminal contempt and sentencing him to consecutive thirty-day jail terms for criminal contempt.

In 1986, the year relevant to the questions presented in this petition, New York's Civil Practice Law and Rules

("CPLR") permitted "personal service" of civil process by delivering it to a person of suitable age and discretion at the actual place of business, dwelling place or abode of the person to be served and mailing it to his last known residence – commonly known as "leave and mail" service. *See* CPLR § 308(2).[1] (App. 35) No prior diligent effort to deliver the papers to the person to be served was required. The New York City Civil Court Act ("NYCCCA") permitted, and still permits, "leave and mail" service, in certain enumerated housing matters, at an address registered with Respondent Department of Housing Preservation and Development ("HPD") as the address of the person responsible for the maintenance of a particular multiple dwelling, rather than at the actual place of business and last known residence of the person to be served. *See* NYCCCA § 110(m). (App. 42)

In the instant case, service of orders to show cause commencing *civil and criminal contempt proceedings* in the Civil Court, Housing Part, against Petitioner and other named respondents was made, under the authority of CPLR § 308(2) and NYCCCA § 110(m), by "leave and mail" service to an address registered with HPD for seven particular multiple dwellings. The orders to show cause alleged that the respondents had failed to comply with orders of the Civil Court, Housing Part, to supply

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[1] CPLR § 308(2) was amended in 1987 to permit, in "leave and mail" service, mailing the summons to the person's actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside that the communication is from an attorney or concerns an action against that person.

adequate heat and hot water to various buildings. Petitioner was never personally served with the orders to show cause, and there was no evidence that he had actual notice of the proceedings. An attorney did appear on behalf of the collective respondents, which included corporate ones, but there was no indication that the attorney was expressly or implicitly authorized to appear on behalf of Petitioner personally. Petitioner himself never appeared in court at any stage of the proceedings.

Following three contempt trials before the housing judge, at which Petitioner was not present, the court issued two opinions dated August 6, 1986, encompassing six of the seven underlying proceedings, and rejected the respondents' challenge to the adequacy of the service of the order to show cause commencing the contempt proceedings (App. 15-16, App. 21-22), ruling that "New York City Civil Court Act § 110(m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings" (App. 21). The judge concluded that Petitioner willfully failed to comply with the underlying orders and was guilty of civil and criminal contempt. (App. 17, 22-23) In an opinion dated August 11, 1986, the court reached the same conclusion with respect to the seventh proceeding. (App. 28)

Although the underlying proceedings giving rise to the contempt litigation were originally seven in number, Respondent HPD had moved successfully to consolidate five of them, and the Civil Court housing judge consolidated all seven contempt matters into one sentencing hearing on August 13, 1986. Petitioner did not appear at that hearing. On the following day, the court issued the

first of a series of seven orders, imposing seven consecutive thirty-day jail terms on Petitioner for criminal contempt. Other than the orders to show cause that commenced the proceedings, there was never any order, summons, appearance ticket or other directive requiring Petitioner to appear or advising him of the proceedings.

Petitioner appealed to the Appellate Term from the orders imposing the seven consecutive thirty-day jail terms,[2] contending that personal delivery of process is required in criminal contempt proceedings and abandonment of that requirement collides with basic due process rights. (App. 45) The Appellate Term, however, in an opinion encompassing five of the contempt proceedings, held that "[t]he method of service employed in this proceeding, one of the methods delineated in the New York statute governing service in civil actions generally, was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). (App. 5) The opinion further stated: "[T]he criminal contempt statute in New York provides for a maximum jail term of 30 days (Judiciary Law, §751, subd. 1), a contempt which would be considered 'petty' under *Bloom [v. Illinois*, 391 U.S. 194, 201 (1986)], and does not implicate the constitutional guarantees otherwise applicable to the trial of a serious crime."[3] (App. 4) The orders in

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[2] The orders were stayed by the state appellate courts and remain stayed pending determination of this petition.

[3] The opinion erroneously recites in its opening paragraph that Petitioner was sentenced to a definite term of thirty days. Actually, the appeal decided by that particular opinion encompassed *five* thirty-day terms, to run consecutively.

the two remaining contempt proceedings were affirmed by the Appellate Term in two subsequent per curiam opinions which cited to the foregoing opinion. (App. 7, 9) The Appellate Term, however, granted Petitioner leave to appeal to the Appellate Division.

In the Appellate Division, where all seven contempt proceedings were consolidated, Petitioner again maintained that, to punish for criminal contempt, personal delivery of process to the alleged contemnor himself is required by the Due Process Clause, particularly where a person is sentenced to seven consecutive thirty-day jail terms. (App. 46) The Appellate Division, however, affirmed the Appellate Term orders without opinion. (App. 30) The court subsequently denied Petitioner's application for leave to appeal to the New York Court of Appeals, but did stay the contempt orders pending filing and determination of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The adequacy of notice afforded by state service-of-process statutes and the constitutional requirements for criminal contempt proceedings are two evolving lines of law that intersect in this case. Although the Court has noted generally that criminal procedure protections are required in criminal contempt proceedings, *see e.g., Hicks v. Feiock*, 108 S. Ct. 1423, 1430 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2133 (1987), the Court has not determined what degree of notice is required in criminal contempt

proceedings.[4] Since the state courts held in Petitioner's case that the notice required for criminal contempt proceedings is the same as for civil proceedings generally, the Court should review that determination and decide whether it comports with the Due Process Clause.

This Court has been vigilant in policing the adequacy of state service-of-process statutes, *see, e.g., Greene v. Lindsey,* 456 U.S. 444 (1982)(Kentucky statute permitting service of process in forcible entry and detainer actions by posting a summons "in a conspicuous place on the premises" did not satisfy the requirements of the Due Process Clause). The Court has also been sensitive to protecting federal constitutional rights in the context of criminal contempt proceedings, *see, e.g., Hicks v. Feiock,* 108 S.Ct. at 1430 (distinguishing between civil and criminal contempt and noting "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires for such criminal proceedings"); *Codispoti v. Pennsylvania,* 418 U.S. 506 (1974) (jury trial required where criminal contempt sentences imposed were to be served consecutively and aggregated more than six months).

In *Hicks v. Feiock,* the Court noted that for purposes of applying the Due Process Clause and other provisions of the Constitution to contempt proceedings, it is necessary to classify the relief imposed in such a proceeding as

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[4] In *Cooke v. United States,* 267 U.S. 517 (1925), the Court stated generally that due process of law in the prosecution of contempt requires that the accused be advised of the charges and have a reasonable opportunity to meet them. *Id.* at 537.

civil or criminal in nature. 108 S.Ct. at 1429. However, "the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Id.* It is the substance of the proceeding and the character of the relief that is critical. *Id.* In civil contempt, the punishment is remedial, for the benefit of the complainant; in criminal contempt, the sentence is punitive, to vindicate the authority of the court. *Id.*

The *Hicks* Court stated that these distinctions lead up to "the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires for such criminal proceedings." *Id.* at 1430. The Court pointed out that if only civil coercive remedies had been imposed, it would be improper to invalidate that result "merely because the Due Process Clause, as applied in *criminal* proceedings, was not satisfied." *Id.* at 1433 (emphasis in original).

Although not addressing the question of notice in criminal contempt proceedings directly, the *Hicks* Court did observe:

> This can also be seen by considering the notice given to the alleged contemnor. This Court has stated that one who is charged with a crime is "not only entitled to be informed of the nature of the charge against him but to know that it is a charge and not a suit." *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 446, 31 S.Ct. 492, 500, 55 L.Ed. 797 (1911). Yet if the relief ultimately given in such a proceeding is wholly civil in nature, then this requirement would not be applicable.

Id. n. 10. Thus, contrary to the state courts' analysis that the method of service employed here was "one of the methods delineated in the New York statute governing service in civil actions generally [and] was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action" (App. 5), due process requires more heightened notice in a criminal contempt proceeding than in civil actions generally. Leave and mail service to an address registered with HPD does not satisfy that heightened standard.[5] Indeed, the notice here was actually *less* than that given in an ordinary civil lawsuit in New York, since, under the asserted authority of NYCCCA § 110(m), HPD did not even deliver process to Petitioner's "actual place of business, dwelling place or usual place of abode" and mail it to his "last known residence," as would be required by CPLR § 308(2).

Where criminal sanctions may be imposed, resulting in the loss of liberty, the best means of notice must be

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[5] The Appellate Term held that no heightened notice was required because:

> [T]he separate proceedings to punish for criminal contempt has traditionally been viewed in New York as a *civil* special proceeding, notwithstanding the necessity that the accused be shown to have violated the underlying order with a higher degree of willfulness than is required in a civil contempt proceeding. In consequence, the rules of *civil* rather than criminal procedure should govern the origination of the criminal contempt application.

(App. 3-4; citations and footnote omitted; emphasis in original.)

given to the accused, not merely notice "reasonably calculated" to apprise him of the pendency of the action. The United States Court of Appeals for the Second Circuit, in *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir.), *cert. den. sub nom. Santoro v. United States*, 409 U.S. 1063 (1972), set forth this requirement succinctly in the context of a person accused of a federal crime:

> Before a trial may proceed in the defendant's absence, the judge must find that the defendant has had adequate notice of the charges and proceedings against him. Notice is initially given to a defendant by issuance of an indictment. But not until the defendant answers the indictment by pleading in open court to the charges therein can a court know with certainty that the defendant has been apprised of the proceedings begun against him. Thus no defendant can be tried until after he has personally entered a plea to the charge. It must clearly appear in the record, however, that the defendant was advised when proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present at the designated time and place before the trial may proceed in his absence.

Id. at 1209; *see also* New York Criminal Procedure Law ("CPL") § 170.10(2) (person charged with misdemeanor must be personally present at arraignment, must be informed by court of charges against him, and must be furnished with copy of accusatory instrument). At the very least, therefore, the failure to deliver the order to show cause to Petitioner personally constituted a denial of due process. *Cf.* CPL § 150.40(2)("An appearance ticket, other than one issued for a traffic infraction related to parking, must be served personally"); *People v. Turkel*,

130 Misc. 2d 47, 494 N.Y.S.2d 984, ___ N.E.2d ___ (Crim. Ct. N.Y. Co. 1985) (personal delivery of criminal summons is required under CPL § 130.40).

Moreover, even if personal, in-hand delivery of process to the alleged contemnor were not required in every criminal contempt proceeding, it was required here, since seven consecutive thirty-day jail terms were imposed on petitioner following the sentencing hearing. The Appellate Term, losing sight of the fact that the sentences here were to run consecutively, incorrectly focused only on the thirty-day jail term for criminal contempt authorized by New York Judiciary Law § 751, and held that such a contempt is "petty" under *Bloom v. Illinois*, 391 U.S. 194, and "therefore does not implicate the constitutional guarantees otherwise applicable to the trial of serious crimes." (App. 4) A "serious" crime has been defined by the Court as one with a prison sentence longer than six months. *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (sentence longer than six months triggers right to jury trial).

In *Codispoti v. Pennsylvania*, 418 U.S. 506, the Court held that, even though no sentence for more than six months was imposed for any one act of criminal contempt, a jury trial was required where the sentences imposed were to be served consecutively and aggregated more than six months. Codispoti had been charged with and convicted of seven separate contempts occurring on different dates. 418 U.S. at 507 n. 1. The judge imposed a separate six-month sentence for each contempt "but also determined that the sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term beyond that allowable for a

petty criminal offense." *Id.* at 516. The Court therefore reversed the contempt convictions.

Here, where the consecutive sentences imposed on Petitioner exceeded six months in the aggregate, he was entitled to the constitutional guarantees applicable to serious crimes. Consequently, putting aside whether he was entitled to a jury trial, he was at the very least entitled to the due process that one charged with a serious misdemeanor or a felony would receive. This includes, at minimum, personal notification of the charge. In the context of this case, such notification should have been given by personal delivery of the order to show cause to Petitioner. Failure to do so denied Petitioner due process.

This Court should therefore grant certiorari to determine what notice was required to be given in the criminal contempt proceedings here and in criminal contempt proceedings generally.

CONCLUSION

The Petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, should be granted.

Dated: New York, New York
December 21, 1989

Respectfully submitted,

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[Opinion of the Appellate Term in *Department of Housing v. 24 West 132 Equities, Inc., et ano*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

NOVEMBER 1986

PRESENT: HON. JAWN A. SANDIFER, J.P.
HON. STANLEY PARNESS
HON. STANLEY S. OSTRAU

Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	
Petitioner-Respondent,	
-against-	#86-654
24 WEST 132 EQUITIES, INC.,	
Respondent,	
-and-	
ANDONIS MORFESIS,	
Respondent-Appellant.	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered August 14, 1986 (Lewis Friedman, H.J.) which, after a trial, adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite term of 30 days.

PER CURIAM:

Order entered August 14, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs.

The underlying proceedings, brought by petitioner Department of Housing Preservation and Development (HPD) for heat and hot water violations at building premises allegedly owned or controlled by respondent Morfesis, resulted in the entry of default judgments which imposed civil penalties and directed respondent to provide essential services as required by law. No motion was made to vacate those defaults. Subsequently, petitioner moved to hold respondent in civil and criminal contempt because of the continued absence of adequate heat and hot water at the buildings involved. The order to show cause, permitting service under CPLR 308, was not personally delivered to respondent (CPRL 308[1]), but rather was left with a person of suitable age and discretion at respondent's business office and mailed to his last known residence as registered with HPD (CPLR 308[2]). After a hearing on the contempt applications (at which respondent was represented by counsel), the Housing Court determined that the conditions in the subject premises were "absolutely deplorable" and that there was "no doubt whatever" that respondent's acts in failing to provide heat or hot water were willful. Accordingly, respondent was adjudged in civil and criminal contempt and, on the latter, sentenced to a jail term of 30 days.

Our review of the testimony taken from tenants and HPD inspectors regarding conditions at the buildings satisfies us that petitioner established beyond a reasonable doubt that respondent was guilty of willful and

deliberate disobedience of the court's underlying mandates. The principal issue raised here is that the jurisdiction requisite to support a criminal contempt conviction was not obtained. Respondent argues that inasmuch as a criminal contempt proceeding is essentially a criminal prosecution in all material respects, the contemnor is entitled to the process due any criminal defendant, i.e., personal and actual notice of the charges against him. In respondent's view, service of the order to show cause bringing on the contempt application must be by personal, in-hand delivery, and a petitioner may not resort to the other alternatives specified in the CPLR which confer jurisdiction in a civil action.

It is well settled that a proceeding to punish for a criminal contempt of court arising out of or during the trial of a civil action commences a special proceeding which is separate and distinct from the original action (Board of Education v. Pisa, 54 AD2d 821; Matter of Murray, 98 AD2d 93). Hence, jurisdiction must be acquired anew. But, contrary to respondent's argument, the separate proceedings to punish for a criminal contempt has been traditionally viewed in New York as a *civil* special proceeding (Matter of Douglas v. Adil, 269 NY 144, 146), notwithstanding the necessity that the accused be shown to have violated the underlying order with a higher degree of willfulness than is required in a civil contempt proceeding.[1] In consequence, the rules of

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[1] It is true that insofar as "serious" criminal contempts are concerned, where the contemnor is subject to extended incarceration, constitutional provisions mandating a jury trial in

(Continued on following page)

civil rather than criminal procedure should govern the origination of the criminal contempt application (Siegel, New York Practice, § 484, p. 650).

As previously observed by Judge Friedman in his extensive analysis of the subject (see Department of Housing Preservation and Development v. Arick, 131 Misc.2d 950), while the cases uniformly utilize the term "personal service" as a jurisdictional predicate for criminal contempt (e.g., Lu v. Betancourt, 116 AD2d 492; Matter of Murray, 98 AD2d 93, 98; People v. Balt, 34 AD2d 932), there is no appellate case expressly holding that personal delivery of the order to show cause is the only permissible means of commencing a criminal contempt proceeding, or holding that statutory alternatives to in-hand delivery are jurisdictionally infirm (but cf. State of New York v. International Conference of Police Associations, 98 Misc.2d 1052). Many of the cases in which service has not been upheld involved situations where service was made only upon the contemnor's attorney or others unconnected with the contemnor (Department of Housing v. Arick, supra, p. 955, and cases cited therein). Here, personal service upon respondent was effected in compliance with the "leave and mail" provision of CPLR 308. Personal delivery of process, as a heightened form of notice, is of course always preferable, but due process

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(Continued from previous page)

criminal prosecutions are implicated (Bloom v. Illinois, 391 U.S. 194). However, the criminal contempt statute in New York provides for a maximum jail term of 30 days (Judiciary Law, § 751, subd. 1), a contempt which would be considered "petty" under Bloom, and which does not implicate the constitutional guarantees otherwise applicable to the trial of serious crimes.

does not require it in special proceedings such as this one so long as the party charged is notified of the accusation and is afforded a reasonable time to defend (Judiciary Law § 751, subd. 1; Cooke v. United States, 267 U.S. 517, 537). In the particular context of contempts not committed in the immediate presence of the court, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders. The method of service employed in this proceeding, one of the methods delineated in the statute governing service in civil actions generally was one reasonably calculated under all the circumstances to apprise respondent of the pendency of the action (see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314). Jurisdiction over the respondent's person was, therefore, lawfully obtained. The designated housing judges who preside in the housing part of Civil Court are officers of that court and are expressly authorized by statute to punish for contempts in the same manner as civil court judges (CCA §§ 110[e]; see also, Judiciary Law § 757). In light of the housing part's expansive jurisdiction over proceedings to enforce proper housing standards (CCA § 110[c]), and the unrestricted conferral of the contempt power upon the specialized judges of that part, it is fair to conclude that the Legislature intended for those judges to adjudicate both civil and criminal contempt applications arising out of the civil proceedings commenced in the part.

I concur /s/ I concur /s/ I concur /s/

[Opinion of the Appellate Term in *Department of Housing v. Chance Equities, Inc., et al.*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

JANUARY 1987

PRESENT: HON. STANLEY PARNESS, J.P.
HON. JAWN A. SANDIFER
HON. STANLEY S. OSTRAU
Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	
Petitioner-Respondent,	
-against-	#87-047
CHANCE EQUITIES, INC., and MARIA MORFESIS,	
Respondents,	
-and-	
ANDONIS MORFESIS,	
Respondent-Appellant.	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered October 8, 1986 which, after a hearing (Lewis Friedman, H.J.) adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite term of 30 days.

PER CURIAM:

Order entered October 8, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs (see Department of Housing Preservation and Development v. 24 West 132 Equities, Inc., NYLJ, December 11, 1987, p. 12).

I concur /s/

I concur /s/

I concur /s/

[Opinion of the Appellate Term in *Department of Housing v. 232 West Associates, et al.*]

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

MARCH 1987

PRESENT: HON. XAVIER C. RICCOBONO, J.P.
HON. JAWN A SANDIFER
HON. STANLEY PARNESS
Justices.

DEPARTMENT OF HOUSING PRESERVATION, AND DEVELOPMENT OF THE CITY OF NEW YORK,	:	
Petitioner-Respondent,	:	
-against-	:	#87-141
232 WEST ASSOCIATES and JOSEPH COLON,	:	
Respondents,	:	
-and-	:	
ANDONIS MORFESIS,	:	
Respondent-Appellant.	:	

Respondent Andonis Morfesis appeals from an order of the Civil Court, New York County, entered November 24, 1986 which, after a hearing (Lewis Friedman, H.J.) adjudged respondent in civil and criminal contempt, and sentenced respondent to a definite jail sentence of 30 days.

PER CURIAM:

Order entered November 24, 1986 (Lewis Friedman, H.J.) affirmed, with $10 costs (see Department of Housing Preservation and Development v. 24 West 132 Equities, Inc., NYLJ, December 11, 1987, p. 12).

I concur /s/

I concur /s/

I concur /s/

[Opinion of Housing Court, Dated August 6, 1986]

CIVIL COURT OF THE CITY OF NEW YORK COUNTY OF NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against-

TONY MORFESIS, et al.

Respondents.

HP 1531/86

OPINION

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced five separate proceedings, under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain orders requiring the respondents to provide heat and hot water to specified multiple dwellings. The proceedings involved different premises in Manhattan which were allegedly owned or controlled by different combinations of the respondents. The buildings involved in these proceedings are:

369 West 126th Street	Index No. HP 1531/86
24 West 132nd Street	Index No. HP 1534/86
537 West 133rd Street	Index No. HP 1535/86
541 West 133rd Street	Index No. HP 1536/86
236-238 West 149th Street	Index No. HP 1544/86

In each case it was alleged that respondents were the "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. Each proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a Mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced each of the individual proceedings, December 12, 1985, an attorney was in court on behalf of each of the respondents and requested an adjournment; she did not file a written notice of appearance. The cases were adjourned.

On December 17 counsel for respondents did not file an answer or a written appearance but requested a further adjournment for several weeks. The court, in conformity with the practice established in the Code Enforcement Part of the Housing Court for many years, refused to adjourn the matter unless an "interim order" to require heat and hot water pending the disposition of the case were entered. See §§D26-53.01, 53.05. Counsel refused to consent to the "interim order" but insisted on a January trial date. In light of the similarity of the parties the cases were consolidated. The adjournment requested by respondents' counsel was granted and a single order was signed in the consolidated case requiring compliance with Article 17 of the HMC pending the next court date, January 10. On that date a further adjournment was had.

On January 16, 1986 an attorney again appeared in court for respondents but left before the case was called. When no one appeared for respondents for trial an order

was signed on default. That default order imposed civil penalties and included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC.

The Instant Proceeding

By order to show cause signed April 15, 1986 the petitioner sought civil and criminal contempt sanctions for violations of the December 17 and January 16 orders. The application was based on a series of violations for inadequate heatr and hot water which had been issued at the various buildings involved in the case. Although a written response was never filed to the contempt proceeding, the matter proceeded to trial.

The petitioner's case at the trial relied on numerous violations which had been issued on the various buildings. The violations were placed during the period after the orders were signed through early May. They depicted a total disregard for the health and welfare of the tenants in the premises. The number and nature of the violations for inadequate heat and hot water are summarized below with some indication of the extreme temperatures recorded by the DHPD inspectors. Some of the violations were also for a lack of any hot water supply. The breakdown, by building, shows:

369 West 126th Street 7 Heat 7 Hot water

(lowest room temp 44; lowest hot water temp 38)

24 West 132nd Street 8 Heat 10 Hot water

(lowest room temp 50; lowest hot water temp 36)

537 West 133rd Street 15 Heat 21 Hot water

(lowest room temp 46; lowest hot water temp 36)

541 West 133rd Street 6 Heat 8 Hot water

(lowest room temp 48; lowest hot water temp 40)

236-238 West 149th Street 7 Heat 7 Hot water

(lowest room temp 40; lowest hot water temp 32)

The petitioner further called a series of tenants who lived in the various buildings. The witnesses, each all of whom the court found to be credible, testified in substance that there was very little heat during the entire heating season. In one building there was heat for only 17 days during the period after the December order was signed.

The petitioner further called an inspector who had worked in the plumbing and heating field for 12 years. He testified as to the conditions which he observed at each of the five buildings. Even in May the boilers were in deplorable condition and some were not functioning.

At the end of the petitioner's case it was dismissed as to all respondents except for Andonis Morfesis (also known as "Tony") since the petitioner could not produce affidavits of service of the order to show cause which commenced the contempt proceeding. The respondent called one witness to describe the conditions of the heating plant at 2 of the buildings and the difficulties with vandalism. The witness testified that he ceased to do business with Mr. Morfesis in January 1986 because there was a new managing agent for the properties and the new agent used a different oil company. The witness

acknowledged that Mr. Morfesis had used several other suppliers for his many buildings and he did not know if he still owned or controlled these. No other witness testified for respondents.

The respondent Morfesis's position was that the petitioner had not properly served the papers in the underlying proceeding, had not properly served the orders which were the basis of the contempt proceeding, had not properly served the order to show cause which commenced the contempt proceeding, and had not established that Mr. Morfesis was an "owner" of the properties, under HMC §D26-1.07 (45) at the time of the 1986 violations.

Respondent's arguments

Respondent challenges the court's jurisdiction to enter the orders in the underlying proceeding. The January 16 orders were signed on default. Respondent never moved to set them aside. Accordingly it is too late at this juncture to argue the merits of the underlying proceedings.

In any event there is nothing in the record before the court to show that the underlying proceedings were not validly commenced. Respondent has not offered any proof to show the invalidity of the service of the original orders to show cause. The affidavits of service are clearly sufficient on their face to establish the court's jurisdiction to determine the merits of the injunction and penalty cases. Each affidavit of service shows substituted or "mail and nail" service at the address registered by the respondent with DHPD as required by HMC Article 41. As this court has previously held, New York City Civil Court Act

§110 (m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings. "In short, respondent, who registered the addresses, should not now be permitted to deny that the address served is the proper place." *Department of Housing Preservation & Development v. Arick*, 133 Misc 2d ___ (Civ. Ct. NY Co 1986), Index No HP 77/85.

It may well be that respondent's counsel's appearance to request adjournments was the equivalent of a formal appearance sufficient to confer jurisdiction in the absence of an objection. See CPLR 320 (b). The law is well settled that the time to raise a lack of personal service objection is before an order is violated, not after. *County of Orange v. Civil Service Employees Assoc., Inc*, 51 AD 2d 1031 (2nd Dept 1976); CF. *United States v. United Mine Workers*, 330 U.S. 258. Respondent cannot litigate the validity of service of the underlying proceeding during this contempt proceeding.

Clearly, if the original proceeding was properly commenced, which respondent cannot now challenge, the service of the certified copies of the December and January orders was proper. See CPLR 5104. Respondent was also aware through counsel that the December order was signed since counsel was standing at the bench when the court granted her application to adjourn and signed the order.

Respondent also attacks the service of the order to show cause which commenced the contempt proceeding. Although no formal answer was served, the holding in *Lu v. Betancourt*, 116 AD 2d 492 (1st Dept 1986), probably permits it to be raised even though not pleaded. Compare

CPLR 3211 (a). The primary objection to jurisdiction is that service was not "personal". This court has dealt with that claim at length in *Department of Housing Preservation & Development v. Arick, supra,* has noted the distinction between "personal service" and "personal delivery" and will not repeat that analysis here. The cases cited by respondent do not require a different result from that in *Arick*. Suffice it to say that there was valid "personal service" on respondent here. The mailing to the address set forth in the registration statements filed by respondent is sufficient under NYCCCA §110 (m) and CPLR 308 (2), (4). Respondent may, as his counsel has argued, have a residence that differs from the one that he registered. The failure to serve at such a new residence is respondent's fault, not petitioner's. Similarly it is of no moment that respondent's former home and business addresses were the same and are not allegedly different. In any event, if the correct current addresses differ from those registered by respondent, there is no proof of them in the record.

Respondent argues that there was no proof that he was an "owner" of the properties at the times in question. He misperceives the issues in the contempt proceeding. The existence of the underlying order established sufficient basis for the proceeding to hold respondent in contempt for a violation simply upon proof of noncompliance. Additionaly there was proof before the court in the registration statements sufficient to justify the entry of the injunctions. There is nothing credible before the court to lead to a conclusion that the conditions have changed. The "new" registrations did not change the fact that the tenants did not ever see or learn of the alleged

new managing agents. Simply put, on this record there is ample basis to conclude that the respondent, Mr. Morfesis, had the ability to comply with the court order, which, of course, is the only relevant inquiry at this time.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the court's orders. There is no doubt whatever that the respondent's acts in failing to provide heat or hot water were willful. The extreme temperatures in the buildings over an extended period of time and the total absence of hot water can only be construed as a disregard for the life and health of the numerous tenants in the buildings at issue here. The problems are not attributable to vandalism or to accidental breakdowns as gratuitously suggested by respondent's counsel without evidentiary support.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the respondent Andonis "Tony" Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986,

p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 6, 1986

/s/
Lewis R. Friedman
Housing Judge

[Opinion of Housing Court,
Dated August 6, 1986]

CIVIL COURT OF THE CITY OF
NEW YORK COUNTY OF
NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against- HP 519/86

ANDONIS MORFESIS and 182 East 122nd Street Equities, Inc OPINION

Respondents.

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced a proceeding under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain an order requiring the respondents to provide heat and hot water to 182 East 122nd Street (the "premises"). The premises were allegedly owned or controlled by the respondents.

It was alleged that respondents were "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. The proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced the proceeding, March 6, 1986, no one

appeared on behalf of the respondents. A order was signed on default. That default order imposed civil penalties and included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC. The order was served on respondents on March 14.

The Instant Proceeding

By order to show cause signed June 13, 1986 the petitioner commenced a proceeding for civil and criminal contempt sanctions for violations of the March 6 order. The application was based on a series of violations for inadequate heat and hot water which had been issued at the premises. Respondents' written answer challenged service of the papers, interposed a general denial and alleged the defenses available in a civil penalties proceeding. see HMC §D26-51.01 (k).

The petitioner's case at the trial relied on several violations which had been issued at the premises for a lack of heat and hot water for the period after the March 6 order had been served. The April 10 violations showed an inside temperature of 60° with the "hot water" at 50°; the April 21 violation was for "hot water" of 42°, heat was not required on that day.

The petitioner further called a series of tenants who lived in the various buildings. The witnesses, each of whom the court found to be credible, testified in substance that there was very little heat during the entire heating season. They maintained that there was no heat or hot water at all until the hot water was restored at the end of June.

The respondents called the current managing agent for the premises to describe the conditions of the heating plant at the premises. The witness testified that various repairs were done to the heating plant until the conditions were so bad that a new hot water heater was installed at the end of June. The agent offered evidence that bills had been submitted to him from repair companies which worked on the heating plant during the winter. Those bills, even if properly admissible, added nothing to the defense. The sere for repairs done January 30, February 18 and March 4; all dates prior to the underlying order here. No other evidence was offered by respondents.

Respondent's arguments

Respondents' primary defense at trial was that the tenants were not telling the truth. The court has observed the demeanor of the witnesses and concludes that they were telling the truth when they testified to the deplorable conditions of a lack of heat and hot water this past heating season. The proof offered by respondents establishes further that there was inadequate heat and hot water this winter.

Respondents challenged the service of the order to show cause which commenced the contempt proceeding. The papers were served at the address of the respondent Morfesis which was registered with the petitioner pursuant to HMC Article 41. As this court has previously held, New York City Civil Court Act §110 (m) is a valid exercise of the State's power to insure that parties receive proper notice of proceedings. "In short, respondent, who

registered the addresses, should not now be permitted to deny that the address served is the proper place." *Department of Housing Preservation & Development v. Arick*, 133 Misc 2d ___ (Civ. Ct NY Co 1986), Index No HP 77/85. Although unnecessary, petitioner also served the papers at another "business address" believed to be used on occasion by Mr. Morfesis.

The primary objection to jurisdiction is that service was not "personal". This court has dealt with that claim at length in *Department of Housing Preservation & Development v. Arick, supra*, has noted the distinction between "personal service" and "personal delivery" and will not repeat that analysis here. Suffice it to say that there was valid "personal service" on respondent here. The mailing to the address set forth in the registration statements filed by respondent is sufficient under NYCCCA §110 (m) and (PLR 308 (2), (4). In any event, if the correct current addresses differ from those registered by respondent, there is no proof of them in the record.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the court's order. There is no doubt whatever that the respondent's acts in failing to provide heat or hot water were willful. The extreme temperatures in the buildings over an extended period of time and the concede lack of hot water can only be construed as a blatant disregard for the life and health of the tenants in the building here.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the

respondent Andonis "Tony" Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986, p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 6, 1986

/s/ Lewis R. Friedman
Lewis R. Friedman
Housing Judge

[Opinion of Housing Court,
Dated August 11, 1986]

CIVIL COURT OF THE CITY OF
NEW YORK COUNTY OF
NEW YORK: PART 18-L

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Petitioner,

-against- HP 1625/86

ANDONIS MORFESIS and EDGECOMBE EQUITIES, INC. OPINION

Respondents.

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LEWIS R. FRIEDMAN, Housing Judge

The petitioner, the Department of Housing Preservation and Development ("DHPD"), commenced a proceeding under Articles 51 and 53 of the Housing Maintenance Code ("HMC") to obtain an order requiring the respondents to provide heat and hot water to 323 Edgecombe Avenue (the "premises"). The premises were allegedly owned or controlled by the respondents.

It was alleged that respondents were "owners" of the property, as the term is defined in HMC §D26-1.07(45), and that violations had been placed at the premises for a lack of heat or hot water as required by Article 17 of the HMC. The proceeding sought the imposition of civil penalties under §D26-51.01(k) and the issuance of a mandatory injunction under §D26-53.01.

On the return of the order to show cause which commenced the proceeding, January 9, 1986, counsel

appeared on behalf of the respondents and signed an "interim order". That order included an injunction which mandated the respondents to provide heat and hot water as required by Article 17 of the HMC. Although the order was consented to by counsel, a certified copy of the order was served on respondents on January 15, 1986. See CPLR 5104.

The proceeding was adjourned to January 14 for the purpose of conducting a hearing on the amount of civil penalty which was due to DHPD. The respondents stipulated that the tenants if called would testify that (a) in apartment 15 there was violations of the heat and hot water provisions for every day from November 26, 1985 and (b) in apartment 9 and 5 there was no water at all for two-and-one-half weeks, no heat at all for three weeks, intermittent heat for the remainder of the post-November 26 period, and poor water pressure.

On January 14 the matter was adjourned for two days. On January 16, no one appeared on behalf of the respondents. An order was signed on default. That default order imposed civil penalties of $25,500 and included a continuing injunction which mandated the respondents to provide heat and hot water as required by HMC Article 17.

The Instant Proceeding

By order to show cause signed April 15, 1986 the petitioner commenced a proceeding for civil and criminal contempt sanctions for violations of the January 9 order. The application was based on two violations for inadequate heat and hot water which had been issued at the

premises subsequent to January 9. Respondents filed no written answer but challenged the petitioner's claims.

The petitioner's case at the trial relied on the violations issued at the premises for a lack of heat and hot water for the period after the January 9 order had been served. The January 25 violation showed an inside temperature of 60° with the hot water at 124°; the March 21 violation was for an inside temperature of 58° and "hot water" of 80°.

Petitioner called as its sole witness the inspector who conducted the March 21 inspection. The witness testified to the manner in which he conducted his investigation and the readings he took.

No evidence was offered by respondents.

Respondents' arguments

Respondents' primary defense at trial was that the inspector was not telling the truth. The respondent conducted a vigorous cross-examination of the inspector's methods and and his general credibility. The court observed the demeanor of the witness and has carefully evaluated his testimony. Despite the arguments proffered by respondent's counsel the court believes the witness and finds that he correctly measured the temperatures in question. There is no doubt that the witness was properly performing his duty and was accurately recalling it for the court.

There is no doubt whatever that the acts of the respondent Andonis Morfesis were in violation of the

court's order. There is no doubt whatever that the respondents' acts in failing to provide heat or hot water were willful. In this regard the court notes the conceded lack of heat and hot water which lead to the entry to the original order. The temperatures in the building over an extended period of time and the lack of hot water can only be construed as a blatant disregard for the life and health of the tenants in the building.

There is no doubt whatever that the acts of the respondent were calculated to and actually did impair, defeat, impede and prejudice the rights of the petitioner in this proceeding. There is no doubt what ever that the respondent Andonis Morfesis is guilty of civil and criminal contempt of this court's orders.

Conclusion

As the above demonstrates there is a more than adequate basis for the imposition of both civil and criminal contempt sanctions.

The judgment to be signed in this proceeding will impose a civil contempt penalty fine of $250. Judic. L. §773; see *S. I. Holding Corp. v. Harris*, NYLJ Feb. 14, 1986, p. 13, col. 1 (App. T. 1st Dept); *State of New York v. Unique Ideas, Inc.*, 44 NY 2d 345, 349-50 (1978). Despite the request by the petitioner, the proof does not support the imposition of an indefinite coercive jail sentence.

For the counts of criminal contempt the court will impose an appropriate fine. The fine will be set not in excess of $250 for each day that there was an absence of heat or hot water as required by the underlying order.

In light of the absolutely deplorable conditions described in the record of this case, a criminal contempt jail sentence is reasonable and will be imposed. The length of the sentence will be determined at a sentencing hearing when the respondent is personally present before the court.

Sentence is set before me for August 13, 1986 at 2 P.M. in Part 18-L, Room 526. If the respondent is not personally present for sentence at that time, an arrest warrant will be issued.

Dated: August 11, 1986

/s/

[ORDER SOUGHT TO BE REVIEWED]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 4, 1989.

Present – Hon. Theodore R. Kupferman, Justice Presiding
E. Leo Milonas
Bentley Kassal
Betty Weinberg Ellerin
Richard W. Wallach, Justices.

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Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 1

24 West 132 Equities, Inc.,

Respondent,

-and-

Andonis Morfesis,

Respondent-Appellant.

---x

Department of Housing Preservation and Development
of the City of New York,

Petitioner-Respondent,

-against- Action No. 2

Chance Equities, Inc. and Maria Morfesis, 36357-58-59

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

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Department of Housing Preservation and Development
of the City of New York,

Petitioner-Respondent,

-against- Action No. 3

232 West Associates and Joseph Colon,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

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Appeals having been taken to this Court by the above-named appellant, from orders of the Appellate Term of the Supreme Court, First Department, entered on December 8, 1987, December 23, 1987, and January 7, 1988, respectively,

Appeal Nos. 36357-58-59

And said appeals having been argued by Herald Price Fahringer, of counsel for the respondent-appellant, and by Janessa C. Nisley, of counsel for the petitioner-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the orders so appealed from be and the same hereby are affirmed, without costs and without disbursements. (See Appeal No. 36380, decided simultaneously herewith.)

ENTER:

ALAN M. BERGER
DEPUTY Clerk.

[ORDER DENYING LEAVE TO APPEAL]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 24, 1989.

Present – Hon. Theodore R. Kufperman, Justice Presiding
E. Leo Milonas
Bentley Kassal
Betty Weinberg Ellerin
Richard W. Wallach, Justices.

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Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 1

24 West 132 Equities, Inc.,

Respondent,

-and-

Andonis Morfesis,

Respondent-Appellant.

M-5361

[3657-58-59]

Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 2

Chance Equitas, Inc. and Maria Morfesis,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

Department of Housing Preservation and Development of the City of New York,

Petitioner-Respondent,

-against- Action No. 3

232 West Associates and Joseph Colon,

Respondents,

-and-

Andonis Morfesis,

Respondent-Appellant.

----------x

Respondent-appellant in the above-entitled actions having moved this Court for leave to appeal to the Court of Appeals from an order of this Court entered on May 4, 1989,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is denied, with $100 costs.

ENTER:

FRANCIS X. GALDI
Clerk.

CIVIL PRACTICE LAW AND RULES

§ 308. Personal service upon a natural person

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. Where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business,

dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

(As amended L.1974, c. 765, § 2; L.1977, c. 344 § 1)

N.Y. CITY CIVIL COURT ACT

§ 110. Housing part

(a) A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows:

(1) Actions for the imposition and collection of civil penalties for the violation of such laws.

(2) Actions for the collection of costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws, or in the removal or demolition of any dwelling pursuant to such laws.

(3) Actions and proceedings for the establishment, enforcement or foreclosure of liens upon real property and upon the rents therefrom for civil penalties, or for costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws.

(4) Proceedings for the issuance of injunctions and restraining orders or other orders for the enforcement of housing standards under such laws.

(5) Actions and proceedings under article seven-A of the real property actions and proceedings law, and all summary proceedings to recover possession of residential premises to remove tenants therefrom, and to render judgment for rent due, including without limitation those

cases in which a tenant alleges a defense under section seven hundred fifty-five of the real property actions and proceedings law, relating to stay or proceedings or action for rent upon failure to make repairs, section three hundred two-a of the multiple dwelling law, relating to the abatement of rent in case of certain violations of section D26-41.21 of such housing maintenance code.

(6) Proceedings for the appointment of a receiver of rents, issues and profits of buildings in order to remove or remedy a nuisance or to make repairs required to be made under such laws.

(7) Actions and proceedings for the removal of housing violations recorded pursuant to such laws, or for the imposition of such violation or for the stay of any penalty thereunder.

(8) Special proceedings to vest title in the city of New York to abandoned multiple dwellings.

(9) The city department charged with enforcing the multiple dwelling law, housing maintenance code, and other state and local laws applicable to the enforcement of proper housing standards may commence any action or proceeding described in paragraphs one, two, three, four, six and seven of this subdivision by an order to show cause, returnable within five days, or within any other time period in the discretion of the court. Upon the signing of such order, the clerk of the housing part shall issue an index number.

(b) On the application of any city department, any party, or on its own motion, the housing part of the civil court shall, unless good cause is shown to the contrary,

consolidate all actions and proceedings pending in such part as to any building.

(c) Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest; provided in the event any such proposed remedy, program or procedure entails the expenditure of monies appropriated by the city, other than for the utilization and deployment of personnel and services incidental thereto, the court shall give notice of such proposed remedy, program or procedure to the city department charged with the enforcement of local laws relating to housing maintenance and shall not employ such proposed remedy, program or procedure, as the case may be, if such department shall advise the court in writing within the time fixed by the court, which shall not be less than fifteen days after such notice has been given, of the reasons such order should not be issued, which advice shall become part of the record. The court may retain continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed.

(d) In any of the actions or proceedings specified in subdivision (a) and on the application of any party, any city department or the court, on its own motion, may join any other person or city department as a party in order to effectuate proper housing maintenance standards and to promote the public interest.

(e) Actions and proceedings before the housing part shall be tried before civil court judges, acting civil court judges, or housing judges. Housing judges shall be appointed pursuant to subdivision (f) of this section and shall be duly constituted judicial officers, empowered to hear, determine and grant any relief within the powers of the housing part in any action or proceeding except those to be tried by jury. Such housing judges shall have the power of judges of the court to punish for contempts. Rules of evidence shall be applicable in actions and proceedings before the housing part. The determination of a housing judge shall be final and shall be entered and may be appealed in the same manner as a judgment of the court; provided that the assignment of actions and proceedings to housing judges, the conduct of the trial and the contents and filing of a housing judge's decision, and all matters incidental to the operation of the housing part, shall be in accordance with rules jointly promulgated by the first and second departments of the appellate division for such part.

(f) The housing judges shall be appointed by the administrative judge from a list of persons selected annually as qualified by training, interest, experience, judicial temperament and knowledge of federal, state and local housing laws and programs by the advisory council for the housing part. The annual salary of a housing judge shall be sixty-six thousand two hundred and fifty dollars.

(g) The advisory council for the housing part shall be composed of two members representative of each of the following: the real estate industry, tenants' organizations, civic groups and bar associations and four members from the public at large. Such members shall be

appointed by the administrative judge, with the approval of the presiding justices of the first and second departments of the appellate division. The members of the advisory council shall be appointed for renewable terms of three years provided that one of the initial members of each classification of membership shall serve for two years. In addition the mayor of the city of New York shall appoint one member to serve at his pleasure and the commissioner of housing and community renewal shall be a member.

(h) The advisory council shall meet at least four times a year, and on such additional occasions as they may require or as may be required by the administrative judge. Members shall receive no compensation. Members shall visit the housing part from time to time to review the manner in which the part is functioning, and make recommendations to the administrative judge and to the advisory council. A report on the work of the part shall be prepared annually and submitted to the administrative judge, the administrative board of the judicial conference, the majority and minority leaders of the senate and assembly, the governor, and the mayor of the city of New York by the thirty-first day of January of each year.

(i) Housing judges shall have been admitted to the bar of the state for at least five years, two years of which shall have been in active practice. Each housing judge shall serve full-time for five years. Reappointment shall be at the discretion of the administrative judge and on the basis of the performance, competency and results achieved during the preceding term.

[*(j) Repealed*]

(k) Unless a party requests a manual stenographic record by filing a notice with the clerk two working days prior to the date set for an appearance before the court, hearings shall be recorded mechanically. A party may request a transcript from a mechanical recording. Any party making a request for a copy of either a mechanically or manually recorded transcript shall bear the cost thereof and shall furnish a copy of the transcript to the court, and to the other parties.

(*l*) Any city department charged with enforcing any state or local law applicable to the enforcement of proper housing standards may be represented in the housing part by its department counsel in any action or proceeding in which it is a party. A corporation which is a party may be represented by an officer, director or a principal stockholder.

(m) The service of process in any of the actions or proceedings specified in subdivision (a) which are brought under the housing maintenance code of the administrative code of the city of New York shall be made as herein provided:

(1) Service of process shall be made in the manner prescribed for actions or proceedings in this court, except where the manner of such service is provided for in the housing maintenance code of the administrative code of the city of New York, such service may, as an alternative, be made as therein provided.

(2) Where the manner of service prescribed for actions or proceedings in this court includes delivery of the summons to a person at the actual place of business of the person to be served, such delivery may be made

alternatively to a person of suitable age and discretion at the address registered with the department charged with the enforcement of local laws relating to housing maintenance pursuant to article forty-one of such code, hereinafter referred to as the "registered address".

(3) Where the manner of service prescribed for actions or proceedings in this court includes affixing the summons to the door of the actual place of business of the person to be served, the summons may, as an alternative, be posted in a conspicuous place on either the premises specified in the summons or the registered address.

(4) Where the manner of service for actions or proceedings in this court includes mailing the summons to the person to be served at his last known residence, the summons may, as an alternative, be mailed to the registered address; however, if the person to be served has not registered as required by article forty-one of such housing maintenance code, such summons may, as an alternative, be mailed to an address registered in the last registration statement filed with such department other than the address of the managing agent of the premises and to the last known address of the person to be served.

(5) Where the manner of service for actions or proceedings in this court includes mailing the summons to the person to be served at his last known residence, if the person to be served is a corporation and if either: (i) an officer of such corporation, (ii) the managing agent of such corporation for the premises involved in the suit or (iii) a person designated by such corporation to receive notices in its behalf, other than the secretary of state, has been named a party to the suit, the summons may, as an

alternative, be mailed to the registered address of such corporation or, if such corporation has not registered as required by such code, to the address of such corporation set forth in a document filed or recorded with a governmental agency.

(6) A copy of the summons with proof of service shall be filed in the manner provided in section four hundred nine, except that such filing shall be made with the clerk of the housing part in the county in which the action is brought.

(n) Nothing contained in the section one hundred ten shall in any way affect the right of any party to trial by jury as heretofore provided by law.

(*o*) There shall be a sufficient number of pro se clerks of the housing part to assist persons without counsel. Such assistance shall include, but need not be limited to providing information concerning court procedure, helping to file court papers, and, where appropriate, advising persons to seek administrative relief.

(Added L.1972, c. 982, § 2; amended L.1973, c. 701, §§ 1-4; L.1973, c. 704, § 1; L.1974, c. 958, § 5; L.1977, c. 849, §§ 1-7; L.1978, c. 309, § 1; L.1978, c. 310, §§ 1-3; L.1978, c. 664, § 4; L.1980, c. 524, § 1; L.1982, c. 665, § 1; L.1984, c. 528, § 1; L.1984, c. 986, § 14)

[EXCERPT FROM PETITIONER'S BRIEF
IN APPELLATE TERM]

"indispensible" least the alleged contemnor be convicted without a full and fair opportunity to be heard prior to the imposition of sentence.

Abandonment of a personal delivery requirement in criminal contempt proceedings would therefore collide with basic due process requirements. The best means of notification must always be utilized in criminal proceedings, e.g. *People v. Turkel*, NYLJ Nov. 1, 1985, p. 13 col. 1 *supra*); trials in abstentia which perforce results from less than the best means of service, have always been deemed obnoxious to the overriding concerns of fundamental fairness (*People v. Smith*, 68 NY2d 725; *People v. Parker*, 57 NY2d 136). A criminal defendant must be warned, on the record, of the consequences of a failure to appear; otherwise, a failure to appear does not warrant the conduct of a trial in defendant's absence. (*People v. Smith, supra*).

Because, as consistently observed above, the full panoply of criminal procedures apply to criminal contempt proceedings, then there is simply no reason why that approach should be jettisoned here. The approach utilized by the Housing Judge here clearly fails to comport with required principles of law. Consequently, there has been a serious infringement upon appellant's due process rights which requires that the criminal convictions be set aside.

[EXCERPT FROM PETITIONER'S BRIEF IN APPELLATE DIVISION]

POINT I

TO PUNISH APPELLANT FOR CRIMINAL CONTEMPT, PERSONAL DELIVERY OF PROCESS TO HIM WAS REQUIRED, BOTH TO OBTAIN JURISDICTION AND TO COMPLY WITH DUE PROCESS.

Introduction

Under New York law, a proceeding to punish for criminal contempt must be commenced by personal, in-hand delivery of process to the alleged contemnor. Such service is also required by the due process clauses of the state and federal constitutions. Even if personal, in-hand service were not required in every criminal contempt proceeding, it was required here, since appellant was sentenced to at least seven consecutive 30-day jail terms.

Failure To Personally Serve The Alleged Contemnor Constitutes A Jurisdictional Defect

In *Lu v. Betancourt*, 116 A.D.2d 492, 496 N.Y.S.2d 754 (1st Dept. 1986), this Court vacated a petitioner's criminal contempt conviction because personal service on petitioner had never been effectuated and, therefore, no criminal contempt proceeding was properly commenced against her. 496 N.Y.S.2d at 756. The Court made clear that "[w]here the penalty of criminal contempt is sought, failure to *personally serve* the alleged contemnor constitutes a jurisdictional de-